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91-1918

No._____

Supreme Court, U.S.
FILED
APR 17 1992
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CARY D. COLES, Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

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April 17, 1992

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QUESTIONS PRESENTED

I. DOES THE ACCUSED WAIVE HIS PREVIOUSLY INVOKED FIFTH AMENDMENT RIGHTS TO SILENCE AND COUNSEL BY MERELY INITIATING FURTHER DIALOGUE WITH POLICE DURING THE BOOKING PROCESS IN THE SAME POST ARREST CUSTODIAL SETTING WHICH RESULT IN INCRIMINATING STATEMENTS, A CONFESSION AND CONSENT TO SEARCH, WITHOUT FIRST RECEIVING NEW MIRANDA WARNINGS?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Cary D. Coles, and the Respondent, the People of the State of Illinois.

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IN THE SUPREME COURT OF THE UNITED STATES

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CARY D. COLES, Petitioner,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Cary D. Coles, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District, entered in the above entitled proceeding on July 19, 1991.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District is reported at 217 Ill. App. 3rd 1079, and is reprinted in the appendix hereto, p.1a, infra.

JURISDICTION

The petitioner appealed from a final judgment of conviction and sentence of six (6) years and two (2) years concurrently and respectively following a stipulated bench trial.

On appeal, the First District of the Illinois Appellate Court entered a judgment and opinion on July 19, 1991, affirming the trial court's finding of guilt and denial of the defendant's motion to quash search and suppress evidence and motion to suppress statement.

A petition for rehearing was denied on September 6, 1991. [See p.16a, infra.]

The Supreme Court of Illinois denied petitioner's petition for leave to appeal on December 4, 1991. [See p.17a, infra.]

On March 3, 1992, Justice Stevens, order that the time for filing this writ of certiorari be extended to and including April 17, 1992.

The jurisdiction of this Court to review the judgment of the Appellate Court of Illinois, First District, is invoked under 28 U.S.C. Section 1257(3).

STATUTE INVOLVED

Fifth Amendment, United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On July 17, 1987, at approximately 1:55 to 2:00 p.m., the Defendant, Cary Coles, was arrested at the home of a confidential informant who was working with the arresting officers of the Wilmette Police Department and the Northeastern Metropolitan Enforcement Group ("MEG").

The Defendant was charged with offenses of delivery of controlled substance and possession of cannabis with intent to deliver.

The Defendant filed a Motion to Suppress Statement and a Motion to Quash Search and Suppress Evidence.

At the hearing on the motions, Officer Provost of the Wilmette Police Department testified that MEG Agent Martinez read the Defendant his Miranda rights from a preprinted card at the scene of the arrest.

The Defendant was transported to the Wilmette Police Department booking room

thereafter, a 10' x 10' room with fingerprint equipment and forms.

Provost then testified he read the Defendant his Miranda rights from a poster on the wall.

Thereafter Provost began asking some preliminary information of the Defendant concerning his name and address.

Provost testified that during this questioning, which took approximately 8 to 9 minutes, the Defendant stopped him and asked him by which department he was employed. Provost told him he was with Wilmette and testified the Defendant said, "That's fine. I'll talk to you but I'm not going to talk to the MEG guys.", and he said something like "I know they will try to fuck me over and you won't.".

Provost further testified that the Defendant and he continued their conversation and the Defendant volunteered to cooperate and do anything to assist Provost in what he was

doing at the time, but advised Provost that he was not going to talk to MEG people.

No incriminating statements were made to this point.

At that time, approximately 2:10 p.m., Special MEG Agent Selecki came in the room where Provost and the Defendant were alone. Selecki told the Defendant he needed to get some information and fill out a personal history form.

The Defendant asked Selecki who he was with, and Selecki said MEG, in which Provost testified the Defendant responded, "I don't want to talk to you.".

Selecki read Miranda type warnings to the Defendant from a pre-printed "Advice Of Rights" form with waiver. [See p.18a, infra]

After his Miranda rights had been read to the Defendant, and in answer to the form waiver question, "Having these rights in mind, do you wish to talk to me/us?", the Defendant wrote "NO" in his own handwriting on the form.

Officer Provost and Special MEG Agent Selecki both signed as witnesses at 2:11 p.m. on July 17, 1987, along with the Defendant.

Provost further testified that Selecki told the Defendant that it was fine if he didn't want to talk to him but he still needed to fill out some information as a part of his processing. He asked the Defendant questions concerning his name, address, telephone number, acquaintances, etc., and Selecki filled out the booking procedure report and Provost completed a lengthy arrest report, fingerprinting and photographs. The booking process took at least 1/2 hour.

Provost testified that Selecki left the room between 2:30 and 3:00 p.m., leaving the Defendant and Provost alone again.

As soon as Selecki left the room, Provost testified that the Defendant again says to Provost, "I'll talk to you. I don't want to talk to those guys. I know they are going to fuck me over."

In response, Provost said that was fine and the Defendant wasn't required to talk to him or MEG, but if he didn't want to talk while they were around, then Provost would ask them to leave the room if they came in.

Provost testified that the Wilmette Police did not have pre-printed Miranda waiver forms at that time.

There is no other evidence that another Miranda warning was given the Defendant at this time.

Provost then testifies that the Defendant related a lot of information about how he could be helpful to the police to mediate his charges. During this time, the Defendant made incriminating statements and confessed.

During the reinterrogation it was brought up about his apartment in Chicago, and Provost told the Defendant that he had other information about him and his narcotic ventures and that he had information about his apartment and what might be contained in the

apartment and that he would be seeking a search warrant and that this information came from a confidential informant who provided the information which led to the arrest. Provost testified that the Defendant was concerned about the police busting down his door, ripping up his home and that his employee who worked at his home would be arrested. Provost asked the Defendant to sign a consent to search.

Provost further testified that he told the Defendant in response to how soon he could get out of the station, that nothing could be done until the investigation was finished and he would not be able to leave the station if he was in the process of getting a search warrant and it could be several hours.

The Defendant was further told of the process of obtaining a bond and since it would be past 3:00 p.m. they would have to get a hold of a bond judge which may not be until the following Monday, 3 days hence. As a

result of that conversation, the Defendant signed a permission to search his apartment at 3:00 p.m.

The Defendant was approximately 19 years old at the time of arrest and had no prior criminal record.

The Defendant testified that he repeatedly asked for an attorney dozens of times and to make a phone call.

The Defendant further testified that it was not until he was denied an attorney and a phone call that he didn't have much choice but to talk to the Provost at that point, because he was told he was going to have a high bond and was going to Cook County Jail.

The Defendant also testified that when he was put in the car at the scene of the crime, Officer Martinez from the MEG unit came over and smacked the Defendant while he was in the police car and said, "You have met MEG."

The Trial Court denied the motion to suppress and motion to quash, stating that it

believed the officer's testimony that the Defendant initiated the conversation with Officer Provost after the MEG officer left the room which led to the further conversations, the confession and the permission to search. The Court found that the State had shown that this was a "totally voluntary type of cooperation on the part of the Defendant".

The case was tried by a stipulated bench trial and the Defendant was convicted of the charges and sentenced to six (6) years and two (2) years concurrently.

On appeal, the Appellate Court affirmed the Trial Court's finding holding that the resumption of dialogue between the Defendant and the Police was initiated by the Defendant and that was the necessary fact which, under the circumstances, proved a valid waiver of the right to counsel and the right to silence had occurred.

REASONS FOR GRANTING WRIT

I. THE ILLINOIS APPELLATE COURT'S MIS-APPLICATION OF EDWARDS V. ARIZONA'S EXCEPTION, FINDING TO THE RULE THAT AN ACCUSED INITIATED DIALOGUE WITH POLICE SATISFIES EDWARDS AS A WAIVER OF THE PREVIOUSLY ASSERTED FIFTH AMENDMENT RIGHTS WITHOUT A RE-ADMONISHMENT UNDER MIRANDA CONFLICTS WITH DECISIONS OF THIS COURT AND RAISES AN IMPORTANT ISSUE TO BE RESOLVED.

The fundamental principals set out in Miranda v. Arizona 384 U.S. 436 (1966), should be clear and easily applied by both the police and the Courts.

Where questions of application have arisen, Edwards v. Arizona, 451 U.S. 477 (1981), and Michigan v. Mosley, 423 U.S. 96 (1975), have set out clear and unambiguous standards and tests by which a determination can be made as to when a waiver of Fifth Amendment rights once invoked is valid.

The Illinois Appellate Court has radically departed from these standards and tests by applying a voluntariness analysis to

find that the only "necessary fact" that State need prove to find a waiver of the previously invoked Fifth Amendment rights, was that the Defendant "reopen the dialogue with the authorities". The decision is clearly at odds with Edwards, as this Court has previously held in Oregon v. Bradshaw, 462 U.S. 1039 (1983).

In Bradshaw, the Court made it clear that they did not hold in Edwards, the initiation of a conversation by the Defendant by itself would amount to a waiver of a previously invoked right to counsel, but that once the right to counsel had been asserted, further interrogation of the accused should not take place "unless the accused himself initiates further communication, exchanges, or conversation with the police". [Bradshaw 462 U.S. at 1043 citing Edwards at 451 U.S., at 485-485.] In Bradshaw, this Court enunciated a prophylactic rule in Edwards designed to protect badgering by the police. [Bradshaw,

462 U.S. at 1044]

It is important that the Supreme Court rendered its authoritative voice in the area of what must be shown to find that the suspect himself initiates dialogue with the authorities that waives his Fifth Amendment right in re-interrogation cases. For the test enunciated in Edwards is being misapplied by the Illinois Appellate Court.

The Edwards test should be the two step analysis found in Bradshaw. First, who initiated further dialogue? If it was the police, there is no valid waiver, per se. If it was the accused, then the second test step must be met. The second prong of the Bradshaw analysis is what is unclear to both police and Courts, and it is this second test step that has been misapplied in this case.

As Bradshaw highlights, it is not the "totally voluntary type of cooperation on the part of the Defendant" standard approved by the Illinois Appellate Court, but, in

restating Edwards second step inquiry, found "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopen the dialogue with the authorities", is the test. [Bradshaw 462 U.S. at 1047 citing Edwards 451 U.S. at 486 n.9.]

The Illinois Appellate Court, like the Oregon Court of Appeals, thought the initiation of the conversation or discussion by the accused not only satisfied Edwards but "ex proprio vigore" sufficed to show the waiver of the previously asserted right to counsel. [Bradshaw, 462 U.S. at 1047] They were both wrong.

The Bradshaw Court said the inquiries are separate and clarity of application is not gained by melding them together. [Bradshaw, 462 U.S. at 1047]

The Bradshaw Court found, and that this Court must now authoritatively emphasis, that Miranda type warnings are essential to effectuate the second prong of the Edwards analysis. Those are the circumstances under which the accused-initiated dialogue after invocation of rights forms a valid waiver.

What the Illinois Court ignores is that in the instant case, the accused initiated the redialogue, not the meeting. The accused, a 19 year old first offender, was clearly in a police initiated, custodial interrogation setting after arrest.

The importance of declaring the re-admonishment after invocation of Fifth Amendment rights is essential in these cases where the police are controlling the setting.

Further, by way of analogy, is this Court's decision in Patterson v. Illinois, 487 U.S. 285 (1988), a Sixth Amendment rights case, which the Court found a right to counsel not substantially different than the right in

custodial interrogation pre-indictment cases. The necessary fact here is not only that the accused reopened the dialogue with the authorities but that the accused was re-read a form waiving his rights under Miranda on both interrogation occasions. In Patterson the Court held that by proving the admonishment of the accused with the re-Miranda warnings, the State met its burden and the accused's waiver of his right to counsel was valid.

Likewise, in Mosley v. Michigan, 423 U.S. 96 (1975), this Court held that the Miranda requirement that police interrogation must cease when the person is in custody indicating he wished to remain silent, neither created a per se proscription of indefinite duration upon any further questioning by the police nor imposed a blanket prohibition against the taking or the admission of evidence of voluntary statements, nor permitted a resumption of interrogation after momentary cessation.

The Mosley Court, however, did made it clear that where the police must scrupulously honor the Defendant's invocation of silence and immediately cease the interrogation and only resumed questioning after a passage of a significant period of time with "the provision of a fresh set of warnings" at the vary outset of each interrogation to not violate the principals of Miranda on reinterrogation. [Mosley, 423 U.S. at 106]

The lower Courts need guidance from this Court as to the applicability of the Edwards rule in the accused initiated dialogue exception cases to clarify the essential requirement of re-admonishing the Defendant of his Miranda rights once he has invoked his right to counsel and right to silence and, thereafter, initiates further dialogue.

Under Edwards and Mosley once the Defendant has invoked his Fifth Amendment rights, all further interrogation must cease.

The only exception for further police

initiated dialogue is the so called "routine booking" procedure exception in which the police merely continue to ask non-testimonial questions to complete the booking and recording keeping process.

As is stated in Pennsylvania v. Muniz, 110 S.Ct. 2638 (1990), however, although certain questions fall within this "routine booking question" exception, as the Amicus Curiae United States explains in note 14, 110 S.Ct. at 2650:

> "[r]ecognizing a 'booking exception' to Miranda does not mean, of course, that any question asked during the booking processing falls within that exception. Without obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminating admissions. Brief for United States as Amicus Curiae 13. See United States v. Avery, 717 F.2d 1020, 1024-1025 (CA6 1983); United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (CA9 1983); United States v. Glen-Archila, 677 F.2d 809, 816 n. 18 (CA11 1982);"

As police procedures become more sophisticated so to must the application of

Miranda, Edwards, Mosley and their progeny.

Police cannot, under the guise of routine booking continue a dialogue with a Defendant who has invoked his Fifth Amendment rights and then, upon the Defendant's initiation of further dialogue, fail to re-admonish him of his Miranda rights. This essential second prong test of knowing and intelligent waiver of those rights includes the essential element of re-admonish-ment with either an execution of a waiver form, which in this instance the Wilmette Police claim not have, or, a continued in accused initiated dialogue after the re-admonitions.

To not re-admonish the Defendant places him in the circumstances that Miranda sought to protect. A custodial interrogation where "inherently compelling pressures which work to undermine the individuals will to resist and to compel him to speak where he would not otherwise do so freely." Miranda, 384 U.S. at 467.

The consent to search form request by the police and the Defendant's consent, having be elicited in the same violative custodial re-interrogation by the police is likewise invalid as a fruit of the poisonous tree.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted. If the Petitioner is correct in urging that the Illinois Appellate Court misapplied the standard in Edwards, this matter should be reversed and remanded to the Illinois Trial Court for the appropriate disposition.

Respectfully submitted,

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April 17, 1992

APPENDIX

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SIXTH DIVISION
JULY 19, 1991

No. 1-89-1122

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of of Cook County
Plaintiff-Appellee,	)	
v.	)	
CARY D. COLES,	)	The Honorable Gerald T. Rohrer
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EGAN delivered the opinion of the court:

After a stipulated bench trial, the defendant, Gary Coles, was convicted of delivery of a controlled substance and possession of cannabis with intent to deliver; he was sentenced to six years on the delivery charge and two years on the possession charge, the sentences to be served concurrently.

The defendant first maintains that reversible error occurred when the judge

denied the defendant's motion to suppress his statement and his motion to suppress evidence seized from his residence.

At the hearing on his motions to suppress, the defendant testified that on Friday, July 17, 1987, at approximately 3:00 p.m. he was arrested by Wilmette police officer John Provost and taken to the Wilmette police department. He was advised of his rights and asked Provost for an attorney and to make a phone call. Provost responded, "You haven't been booked yet, and you cannot make a call until you have been booked and we can keep you here for hours." The defendant signed a waiver of Miranda rights, but put "No" next to the question, "Having these rights in mind, do you wish to talk to me/us?" Provost continued to talk to the defendant. He said the defendant was going to be incarcerated for a long time and if the defendant did not talk to him and submit to an apartment search, he would be put in jail that

evening and would not be allowed to leave custody. The defendant was also told he would not get a bond hearing until the following Monday because the courts were closed over the weekend and that the bond set would be very high. Provost continued talking for approximately one hour and forty-five minutes.

The defendant testified that "at that point, after being told that I would be going to Cook County Jail for the weekend, I told Officer Provost anything he wanted to hear to get out of there. Officer Provost agreed to get me a very inexpensive bail to get me out of there." Provost told the defendant that if he did not sign a consent to search form, a search warrant would be obtained anyway, and the authorities would go to his apartment, which was located at 600 South Dearborn in Chicago, arrest anyone there and tear the apartment apart. Provost asked the defendant if he had ever seen what happens to an apartment or what a home could look like after

it has been searched by the police. The defendant again asked Provost if he could speak with his attorney, and Provost said he could not until he signed the consent to search his apartment. Provost also said that once the search was conducted, the defendant could make a phone call. The defendant then signed the consent-to-search form.

On cross-examination, the defendant said he knew he was under arrest for delivery of almost 29 grams of cocaine. After he had been arrested, an agent of the Metropolitan Enforcement Group (MEG) named Martinez came up to the police car, "smacked" the defendant and said, "You have met MEG." While he was in a room at the Wilmette police station, officers were coming in and out of the room. He admitted that he told Provost that he would speak with Provost because he was from the Wilmette police and he knew Provost would not treat him like the officers from the MEG unit. The defendant said he did not feel comfortable

talking with Provost, but he did not have much of a choice at that point after having been denied a phone call or an attorney. He told another police officer where he lived and whether he was a registered voter. He further testified that he was not surprised when told that he could be held over the weekend in Cook County Jail and that bond could be rather high.

Officer Provost testified that he arrested the defendant at 525 Pinecrest in Wilmette at approximately 2:00 p.m. Present at the scene were other officers from the Wilmette police department and officers from MEG. MEG Agent Martinez read the defendant his Miranda rights from a preprinted card. The defendant was transported to the Wilmette police department in handcuffs. Provost next saw the defendant at approximately 2:00 p.m. in the Wilmette police station booking room. Provost entered the room and uncuffed the defendant. Provost, who was alone in the room

with the defendant, read the defendant his Miranda rights from a poster on the wall. The defendant asked Provost what agency he belonged to, and Provost answered that he was with the Wilmette police department. The defendant then stated, "That's fine. I'll talk to you but I'm not going to talk to the MEG guys. I know they will try to fuck me over, and you won't." The defendant volunteered to cooperate and do anything to assist Provost, but repeated that he would not speak with the MEG people.

MEG Agent Selecki entered the room and told the defendant that he need to get some information from him to fill out a personal history form. The defendant asked Selecki who he was, and Selecki answered that he was a MEG agent. The Defendant said that he did not want to speak to any MEG agents. Selecki read the defendant his Miranda rights from a preprinted form. At approximately 2:10 p.m., the defendant signed a waiver of Miranda

rights from but put "No" after the question that asked whether he wished to talk to them. Selecki told the defendant that he needed to fill out the form even if the defendant was unwilling to speak with him. Among other things, Selecki asked the defendant his name, address, phone number and acquaintances. The defendant also told Selecki the name of his attorney, but never requested permission to call him.

Provost then booked the defendant for the Wilmette police department and for MEG by taking fingerprints and photographs. The booking procedure took approximately one half hour. Selecki left the room between 2:30-3:00 p.m. The defendant again stated that he wanted to talk to the Wilmette police department, but not MEG. Provost told the defendant that he was not required to talk to Provost or MEG. The defendant related information to Provost about how he could be helpful to the Wilmette police department in

return for reduction of his charges.

Provost informed the defendant that he had other information regarding the defendant, his narcotics ventures, and his apartment. He also told the defendant that it was possible that the authorities would be seeking to go to his apartment. He told the defendant that the information was derived from a confidential informant, who told the authorities that he had been in the defendant's apartment and had seen quantities of cocaine and cannabis there. The informant, according to Provost, also informed authorities that in phone conversations on July 17 the defendant indicated that he had large quantities of drugs and offered to bring more than what he had actually brought. Provost told the defendant that the authorities were going to contact the State's Attorney's Office, make an application to search his apartment, and that he and fellow officers would go down to his apartment. The defendant told Provost that he

wished that he would not do that because there was an employee working in his apartment and he did not want the police to break down the door and rip the place up. The defendant also stated his concern for his furniture and that he did not want his employee to get arrested.

At approximately 3:00 p.m., Provost asked the defendant to sign a permission-to-search form. The defendant asked Provost when he could leave the station, and Provost responded that nothing could occur until the investigation was complete and that he could not leave if they were in the process of getting a search warrant for his apartment; that might take several hours. Provost also told the defendant that, since it was past 3:00 p.m., they would have to get a bond judge when they were finished with the investigation. At that point, the defendant signed the permission-to-search form. He later accompanied the police to the apartment and was present during the search.

On cross-examination Provost testified that, before the defendant signed the consent to search form, Provost told the defendant that the investigation could take hours. Provost testified that the form the defendant signed was a "MEG" form because the form usually used by the Wilmette police was being redrafted at that time; no Wilmette police forms were available.

In his ruling denying the motions to suppress the judge said that it was "a question of credibility" that the court had had an opportunity "both to hear the evidence and to observe the demeanor" of both the defendant and the police officers. He concluded that the State had "by clear and convincing evidence" shown that it was a "totally voluntary type of cooperation on the part of the defendant and that any problem that he had in discussing the matter with MEG did not exist in discussing the matter with the Wilmette police department."

Contrary to the defendant's argument, we agree with the judge's determination that this case depends on the credibility of the witnesses. That being so, the question is reduced to this: Accepting the testimony of Officer Provost as true, was the defendant's subsequent statement to Provost inadmissible, as a matter of law, as the defendant contends?

The defendant's entire argument is based on the supposition that once he indicated on the waiver-of-rights form that he did not wish to answer any questions, all questions by all law enforcement officials, was barred, as a matter of law. We do not accept the supposition. In Edwards v. Arizona (1981), 451 U.S.477, 486, N.9, 58 L.Ed 2d 378, 101 S.Ct. 1880, the Supreme Court held as follows:

> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do

> something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." (Emphasis added.)

Officer Provost's testimony established the "necessary fact" that the defendant "reopened the dialogue with the authorities." By his own admission, both before and after the defendant refused to talk to the MEG agent, he told Provost he would talk to him. In fact, he even volunteered to cooperate with Provost. After the MEG agent left the room, the defendant again stated that he wished to speak

with the Wilmette police department and not MEG. Subsequently, he, to use his own words, "told Officer Provost anything he wanted to hear." Under the circumstances, we find no error in the judge's denial of the motion to suppress the defendant's oral statement.

The defendant has cited the additional authority of Minnick v. Mississippi (1990), 112 L.Ed. 2d 489, 111 S.Ct. 486, which we find to be inapposite. In Minnick, the defendant was arrested by California police for murders committed in Mississippi. The next day he answered some questions asked by two FBI Agents. He refused to answer all their questions but told them to return two days later after he had talked to his attorney. He said he would have a more complete statement then with his lawyer present. After the defendant conferred with his appointed lawyer, who told him to answer no questions and to sign nothing, he was questioned by a deputy sheriff from Mississippi, who advised him of

his rights. The defendant refused to sign a rights wavier form but told the deputy about the facts of the murders. The Mississippi Supreme Court upheld admission of the deputy's testimony reasoning that the requirements of Edwards had been satisfied because the subsequent questions initiated by the authorities occurred after the defendant had consulted with an attorney. The United States Supreme Court disagreed, stating, "We decline to remove protection from police-initiated questioning based on isolated consultation with counsel who was absent when the interrogation resumed." (Emphasis added.) (111 S.Ct. at 491.) However, the court added this decisive observation:

> "Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversations or discussions with the authority; but

> that is not the case before us. There can be no doubt that the interrogation in question was initiated by the police; it was a formal interview which petitioner was compelled to attend. Since petitioner made a specific request for counsel before the interview, the police-initiated interrogation was impermissible." (Emphasis added.) 111 S.Ct. at 498.

The overriding difference between the case before us and Minnick (and Edwards) is that the resumption of the dialogue between the defendant and the police was initiated by the defendant, not the police. Both Edwards and Minnick centered on the right to counsel, but their reasoning is applicable to the right to remain silent.

Turning now to the question of his signing of the consent-to-search form, it is appropriate to identify the precise issue as

posited by the defendant. In both this court and the trial court his argument is and was that he gave his consent only because of deception of the part of Provost. In the motion to suppress the evidence seized from his residence, he expressly maintained the following:

> "2. Said officers thereafter deliberately lied to and deceived defendant by telling him they would be able to obtain a search warrant for his apartment in Chicago and would break in said apartment, search and destroy items, and arrest anyone there. At said time said officers well knew they had no probable cause for a search warrant.
>
> 3. Based upon said deceit, defendant signed a consent to search. Defendant's action on signing said consent was involuntary and based upon the police officer's

deception."

We could sustain the judge's ruling on the ground that the defendant has failed to establish any "deception," even if we accepted the defendant's testimony. He testified that Provost said he would get a search warrant; that is not a misrepresentation of an existing fact; nor is the alleged statement of Provost that the police would tear up his apartment. Further, the evidence does not establish that the police could not have obtained a search warrant and there is no showing that the police knew that "they had no probable cause for a search warrant." Lest there be any doubt in the matter, however, we find that the evidence establishes that the signing of the consent form was but evidence of the overall conduct of the defendant indicating a desire to cooperate with the police in the hope of receiving a low bond, an earlier release and mitigation of the charges against him. Consequently, we find no error in the judge's

determination that the defendant voluntarily consented to the search of his apartment.

The defendant's other contention is that the State's evidence violated the due process clause for reasons we will discuss after a recitation of the evidence.

Before July 17, Provost met with a confidential informant, Park Chambers, who told Provost he could arrange a delivery of an ounce of cocaine for $1,400. He and MEG agents interviewed Chambers and made arrangements for the delivery of cocaine on July 17.

Pursuant to those arrangements, on July 17, Provost and MEG Agents Martinez and Livas were present at 525 Pinecrest in Wilmette. It was a single family residence owned by Chambers. At approximately 1:30 p.m., Martinez entered the residence with Chambers and, after searching the residence to make sure no one else was present, "secured it." Martinez had fourteen $100 bills on his

person. The defendant arrived on a motorcycle between 1:52-1:55 p.m. and entered the residence. The defendant asked Martinez and Chambers, who were standing together in the living room, whether they had the money. Martinez said yes and pulled the $1,400 from his pocket and tried to hand it to the defendant. The defendant pointed to Chambers, and Martinez handed the money to Chambers, who in turn haded the money to the defendant. At that point, the defendant removed a white envelope from his pocket which contained a ziplock baggy holding approximately 27.34 grams of cocaine. The defendant put the cocaine in the hands of Chambers, who in turn put it in the hands of Martinez. Chambers and the defendant went into the kitchen while Martinez inspected the envelope.

At approximately 1:56 p.m., Martinez signaled to the police outside by means of electronic device. At that point, Provost and Livas entered the dwelling and went into the

kitchen area where Livas patted down the defendant. Martinez recovered the $1,400 from a bulge in defendant's pocket and read the defendant Miranda warnings. The defendant was transported to the Wilmette police station. Martinez gave the bag of cocaine to Provost, who performed a field test and determined that it was cocaine.

At the station the defendant was questioned as to what was in his apartment, and he responded that there was marijuana, a small amount of cocaine and a pistol. He said that he was not a user but sold cocaine to make money. He also said that he entered Chambers' house, placed the cocaine on the table and was handed the money by Chambers. He discussed his many drug contacts, and offered to lead police to drug dealers with great quantities; he would be able to set up a deal for a "kilo" of cocaine; he had many other sources most of which were in the city of Chicago. Provost told the defendant that

if he wanted to help the police in furthering drug investigations, they would seek the approval of the State's Attorney's Office.

The defendant accompanied the police to his apartment at 600 South Dearborn Street in Chicago. During the trip he volunteered statements to the police in which he said he knew a lot of people in the Wilmette area who were dealing drugs; he offered to take the officers to bars in the Rush street area because many of his contracts were located there.

During the search of the defendant's apartment, the police found a bag containing 27.84 grams of cocaine, two ziplock bags containing cocaine residue and a bag containing 325.2 grams of cannabis.

The defendant testified by stipulation that he was 21 years of age; that he is in the printing business; that on July 17, he went to the residence of Chambers, and encountered Chambers and another man whom he did not know

at the time; that he asked Chambers for some money; the other man produced the money and gave it to Chambers; then he and Chambers went into the kitchen where he received the money from Chambers. The defendant had never been convicted of a crime.

The defendant also established that in 1987 Chambers had been convicted of possession of a controlled substance which was reduced from delivery of a controlled substance and of theft.

The defendant contends that his due process rights were violated because: 1) a search of the premises where a "controlled buy" is to take place must be made to ascertain the presence or absence of a controlled substance; 2) a search must be made of the informant to ascertain whether or not the informant is in possession of a "controlled substance"; and 3) the State must produce an affidavit or testimony by the officer that he did not have in his

possession, any controlled substance before the "controlled buy." He argues that none of those requirements is present in this case.

Many cases have discussed the question of sufficiency of evidence where the sale of a controlled substance was made to an addict-informer; and reviewing courts have not hesitated to reverse convictions where the testimony of the addict-informer was deemed inadequate. (See e.g., People v. Bazemore (1962), 25 Ill. 2d 74, 182 N.E.2d 649; People v. Dade (1968), 109 Ill. App. 2d 337, 248 N.E.2d 844; People v. Jackson (1968), 103 Ill. App. 2d 123, 243 N.E.2d 414.) All cases, whether affirmances or reversals, have been decided on the basis of whether the proof was sufficient to establish guilt beyond a reasonable doubt. No case purports to enunciate bright-line rules as to what procedures must be followed to pass constitutional muster. Consequently, we reject the defendant's argument that the

procedures followed violated the defendant's right to constitutional due process.

Moreover, the evidence did not establish a "controlled buy" as that term is ordinarily understood in the context of transactions involving narcotics. In a "controlled buy" the party making the purchase is an addict-informer. (See People v. Frank (1964), 51 Ill. App. 2d 251, 256, 201 N.E. 2d 197.) The police do not actively participate in the purchase. However, a reading of all the cases analyzing evidence of controlled buys teaches that courts are concerned with the credibility of the informer-purchaser. That concern is not relevant here because Chambers' credibility is not involved.

The case before us is subject to the same test applicable in all criminal cases: Does the record establish guilt beyond a reasonable doubt? The State's case was overwhelming. In addition to Martinez' testimony of the transaction itself and the recovery of the

marked money, there are the defendant's confession and corroborating physical evidence of other cocaine found in his apartment.

For all these reasons, the judgment of the circuit court is affirmed.

Judgment affirmed.

McNAMARA, J., and LaPORTA, J., concur.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	No. 89-1122
CARY D. COLES,	)	
Defendant-Appellant.	)	

O R D E R

IT IS HEREBY ORDERED THAT the appellant's petition for rehearing is DENIED.

/s/ Daniel J. McNamara
DANIEL J. McNAMARA, Justice

ORDER ENTERED
SEP 0 6 91

/s/ Edward J. Egan
EDWARD J. EGAN, Justice

/s/ Rosemary D. LaPorta
ROSEMARY D. LaPORTA, Justice

DATED: September 6, 1991

72665

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035
December 4, 1991

Mr. Carl M. Walsh
Attorney at Law
39 So. LaSalle St., S#820
Chicago, IL 60603

No. 72665 - People State of Illinois, respondent, v. Cary D. Coles, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1991.

NORTHEASTERN METROPOLITAN NARCOTICS
AND DANGEROUS DRUGS ENFORCEMENT GROUP

ADVISE OF RIGHTS/
AVISO DE SUS DERECHOS (SPANISH)

Location: Wilmette P.D.

Date: 17 July 87

Time: 2:10 p.m.

Advise of Rights

CC 1. You have right to remain silent.
CC 2. Anything you say can and will be used against you in a court of law.
CC 3. You have the right to talk to a lawyer and have him/her present with you while you are being questioned.
CC 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
CC 5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Waiver

1. Do you understand each of these rights I have explained to you? **Yes**
2. Having these rights in mind, do you wish to talk to me/us? **No**

Aviso de sus Derechos (Spanish)

1. Usted tiene el derecho de permanecer callado.
2. Caulquier cosa que usted tenga que decir se podra usar en contra suya en la sala

de justicia.

3. Usted tiene el derecho de hablar con un abogado inmediataments, y tenerio presente con usted durante la interragacion.
4. Si usted no tiene fondos con que obtener el servicio de un abodgado, la corte le asignara uno para que lo represente antes de que se le hagan preguntas algunas.
5. Usted puede decidir en cualquier momento en aplicar estos derechos y no contestar ninguna pregunta o hacer ninguna declaracion.

Renuncia (de derechos)

1. Entiende usted todo los derechos que le he explicado?
2. Ahor, teniendo en consideracion estos derechos, desea usted hablar con (migo) (nosotros)?

Witness: /s/ John Provost #551

Witness: /s/ Kenneth Selecki

Signed: /s/ Cary Coles

Name: /s/ Cary Coles
(Printed or Typed)

Time: 2:11 p.m. Date: 17 July 87